NO. 2623

In the

United States
Circuit Court of Appeals

For the Ninth Circuit

THLINKET PACKING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error from the United States District Court for the District of Alaska, Division No. 1

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ROBERT N. MUNLY, and
WINN & BURTON,

Attorneys for Plaintiff in Error.

BEATTIE, PRINTER, JUNEAU

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BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This cause is in the Appellate Court on a Writ of Error from the District Court for the District of Alaska, Division Number One, to review three judgments of conviction rendered by the last mentioned court, and fines imposed thereunder, upon defendant (plaintiff in error) by said last above mentioned court. Throughout this brief we will refer to the Thlinket Packing Company as Defendant and the United States of America as Plaintiff.

The indictments were found under a section of

> "An Act of June 26, 1906, Entitled, 'An Act for the Protection and Regulation of the Fisheries of Alaska.'" This Act of Congress is embodied in the Compiled Laws of the Territory of Alaska commencing at Section 259, page 197, the Indictments being under Section 5 of the Act as originally numbered but under Section 263 of the Compiled Laws of Alaska. In referring to the different sections of the Act in question we shall refer to them under the numbers as they appear in the Compiled Laws in-

stead of the numbers in the original Act. The said Section 263 reads as follows:

> "That it shall be unlawful to fish for, take or kill, any salmon of any species in any manner or by any means, except by rod, spear or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock Post Meridian of Saturday of each week until six o'clock Ante Meridian of the Monday following, or to fish for, or catch, or kill in any manner, or by any appliances except by rod, spear or gaff, any salmon in any stream of less than 100 yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. *Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of webbing or net of the 'Heart' of such traps on each side of the 'Pot' shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes.*"

There were three indictments found against the defendant, numbered in the trial court, 1034-B, 1035-B, and 1036-B. These three indictments con-

tained fifteen counts altogether. *The defendant is charged in counts* 1, 2 *and* 3 *in indictment No.* 1034-*B, and counts* 1 *and* 2 *in indictment* 1035-*B* with having violated said Section 263 in that, between the hours of 6 o'clock Post Meridian on certain Saturdays and 6 o'clock Ante Meridian on certain Mondays during the months of July and August, 1914, in certain waters of Alaska over which the United States has jurisdiction and in the First Division of said District of Alaska, and within the jurisdiction of this court, *it did unlawfully and wrongfully maintain and operate for fishing certain fish traps therein designated without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof, lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.* (P. R. 2-12 incl.)

Counts 4, 5 and 6 of indictment 1034-B, and all of the counts numbered from 1 to 7, inclusive, of indictment No. 1036-B attempt to charge the defendant with having violated said Section 263 by, between the hour of 6 o'clock Post Meridian on certain Saturdays and 6 o'clock Ante Meridian on certain Mondays in the year of 1914 in certain waters of Alaska over which the United States has jurisdiction and in the First Division of the District of Alaska and within the jurisdiction of the trial court, *unlawfully and wrongfully maintaining and operating for fishing certain traps therein designated without having the tunnel of said trap closed and without*

having twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes. (P. R. 2-10 incl. 15-22 incl.)

It will be observed the only difference in the counts or charges contained in the indictments is that in the first class of charges or counts the defendant is accused of violating the section of the statute in question in ONE respect only, viz:

> By its failure, during the weekly close season, "To have twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes";

while in the other class of counts or charges the defendant is accused of violating said section of the statute in TWO respects, viz:

> FIRST, by its failure, during the weekly close season, "To have the tunnel of said trap closed"
>
> SECOND, By its failure during the weekly close season "To have twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot thereof, lifted or lowered in such a manner as to permit the free passage of salmon and other fishes."

A demurrer was interposed to the indictment in cause No. 1034-B as a whole and to each count therein contained separately. (P. R. 24-30).

A like general, special and separate demurrer was interposed to the indictments in cases Nos. 1035-B and 1036-B (P. R. 32-34 and 36-43.)

All of the said demurrers came on for hearing before the court and each and all of them were overruled and denied and the defendant excepted to the ruling of the court and exception was allowed. Whereupon the defendant corporation, through its counsel entered a plea of "not guilty" to the several indictments and the several charges and counts therein contained and the cause was set down for hearing on October 15, 1914.

By agreement of counsel the cases were consolidated for trial.

After the jury was duly qualified, selected, empaneled and sworn to try the consolidated case, and Ernest P. Walker, a witness on behalf of the United States called and sworn to testify, the defendant made certain objections to the introduction of any testimony or evidence in said cause on the grounds set forth in said objections found in the record on pages 152-153 and 154, which said objections and each and all of them were by the court overruled and denied and an exception allowed the defendant. Said objections are set out in full in this Brief under the head "Specification of Errors Relied Upon."

After plaintiff closed its case and had introduced

all of its testimony and evidence, the defendant, through its attorneys, made and filed a motion for a non-suit or a directed verdict in favor of the defendant, which said motion in all respects was overruled and denied and an exception allowed defendant. (P. R. 269-271.) A full copy of the said motion is also set out therein under "Specification of Error Relied Upon."

The defendant then proceeded to introduce its testimony and evidence, and after all the testimony and evidence was in, the defendant in this case offered a set of instructions which are numbered one to five, inclusive, and found in the record on pages 315-318. A full copy of said instructions are set out further on in this Brief.

The court refused to give the said instructions, or any of them, to which refusal and ruling of the court defendant excepted and exception was allowed. At the close of the argument of counsel the court instructed the jury in the manner and form set out in the record pages 319-325 inclusive.

The instructions given the jury by the court were not numbered and were set out somewhat together in the record and the instructions excepted to by the defendant are set out in the Assignment of Errors in this Brief. All of the instructions given by the court were not excepted to. (P. R. 319-326 incl.)

The court instructed the jury that although the cases were consolidated and tried as one it would be their duty to deliberate on each of the three indict-

ments separately and render a verdict in each case of guilty or not guilty, and on the retiring of the jury to deliberate on their verdicts the jury was presented with forms of verdict accordingly. There was no exception taken to these proceedings. After the jury had retired for consideration of their verdicts and had deliberated thereon they came into court with what the foreman stated was three verdicts and the record of what transpired in court at that time will appear from the affidavit of the foreman on file herein, and the affidavit of several other jurors and a partial report of the court stenographer. (Record pages 331 to 337 inclusive.) On account of what occurred at said last mentioned time the defendant's counsel *objected to the court filing or receiving each and all of said verdicts. The objection was overruled by the court an dan exception allowed the defendant. This error will be enlarged on further on in this Brief.*

Motion for new trial was made on the ordinary statutory grounds and on the further ground, "irregularity in the proceedings of the court and jury and orders of the court made at the time and upon the reception of the verdicts herein, and abuse of discretion of the court by said actions, rulings and orders of said Court by which the said defendant was prevented from having a fair trial herein; which said irregularities in the proceedings of the court and jury, and rulings and orders of the Court so made, showing such abuse of discretion will more particularly appear by the affidavits of A. A. Gabbs, Z. M.

Bradford, Joe Pippin, J. L. Gage, Charles H. Hall and Wallis George, jurors, hereto attached, and the stenographic report of the rulings, orders and actions of the court at the time and upon receiving and filing the verdicts herein. (P. R. 331-339.)

As the court stenographer was not present at the time of receiving of the verdicts as above stated, it became necessary upon a motion for new trial to prove by the above mentioned affidavits just what took place at that time. *The facts set up in these affidavits are in no wise contradicted.* The court overruled the several motions for new trial, to which said ruling of the court an exception was asked by the defendant and allowed. In addition to the motion for new trial *a motion of defendant to set aside the verdict and to declare the defendant not guilty was made* and argued at the same time that the motion for a new trial was argued with the understanding that one of the motions would not be considered as a waiver of the other. (P. R. 337-339.) This motion was also overruled and defendant allowed an exception to such ruling of the court. Thereafter separate judgments and sentences upon each verdict in causes Nos. 1034-B, 1035-B and 1036-B were entered by the court against defendant and it was the sentence and judgment of the court that defendant, The Thlinket Packing Company, a corporation, pay a fine of One Hundred Dollars in each of said cases, making a total fine of Three Hundred Dollars. (P. R. 550-554.) The defendant excepted to the entering of said judgments and the imposing of said fines.

SPECIFICATION OF ERRORS RELIED UPON

The trial court erred:

(1) In overruling defendant's general demurrer to each indictment and the special demurrer to each and every count in each and every indictment, which general demurrer to each indictment is as follows:

> "That said indictment does not state facts sufficient to constitute any crime against said defendant corporation."

The special and separate demurrer to each count in each and every indictment is as follows:

> (a) "That the facts stated in said count do not constitute a crime against said defendant company. The mere statement in said count that the said defendant company did unlawfully and wrongfully maintain and operate for fishing a certain trap* * * without having twenty-five feet of the webing or net of the heart of said trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not state or charge any offense or crime against the said defendant."
>
> (b) "That said charge in said count is duplicitous and ambiguous and attempts to charge two crimes, and does not substantially conform with the requirements of Chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of

section 2147 of the said Compiled Laws of the Territory of Alaska in that the statement of facts in said count and the other part of the indictment referring to said count, are not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged."

(2) In overruling and denying defendant's objections made and filed after the empaneling of the jury and when the first witness for the plaintiff, was placed upon the witness stand and sworn to testify, which said objections are as follows:

OBJECTIONS

"Come now M. G. Munley and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to-wit: Indictments Nos. 1034-B, 1035-B and 1036-B, and after the empaneling of the jury and the first witness on the part of the plaintiff, the United States, being sworn to testify concerning the alleged crime set forth in each and all of the counts set out in the foregoing indictments, and object to any testimony or evidence being introduced, offered or received by this court pertaining

to any of the alleged charges in each and every indictment, and in each and every count set forth in the same upon the following grounds and for the following reasons, to-wit:

"I. That each several indictment and every count thereof does not charge the offense defined and set out in the statute. That each several indictment, and every count thereof fails to charge that defendant did unlawfully fish for, take or kill salmon of any species.

"II. That each several indictment and every count thereof does not allege that defendant failed to close the gate, mouth or tunnel, or raise or lower web of the heart next to the pot in a trap designed and used by defendant to fish for, take or kill salmon of any species.

"III. That each several indictment and every count thereof does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge which he is called upon to defend.

"IV That each several indictment and every count thereof fails to allege that said alleged fishing was done during the weekly close season.

"V. That each several indictment, and ev-

ery count thereof does not allege or set out any particulars or facts as to the closing, raising or lowering the webbing of the heart next to the pot in such manner as to permit the free passage of salmon and other fishes in such a way as to embrace every element of the offense defined by the statute.

"VI. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the districts or places excepted from the statute, viz: that it was not in Cook's Inlet, the Delta of the Copper River, Bering Sea, or waters tributary thereto, or that if was not with one of the excepted forms of gear, viz: rod, spear or gaff.

"VII. That each several indictment and every count thereof fails to charge the offense denounced by the statute in such manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the court to pronounce judgment in case of conviction according to the right of the case."

(3) The court erred in permitting the witness Walker to testify on behalf of the plaintiff over defendant's objections as to where the fish traps mentioned in the indictments were located. (P. R. 195.)

(4) The court erred in overruling and denying defendant's motion for non-suit or a directed verdict which was made and filed in court at the close of the evidence and testimony of plaintiff, which said motion is as follows:

> "Come now M. G. Munley and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to-wit: Indictments Nos. 1034-B, 1035-B and 1036-B, and attorneys for said company in all the counts in each and all of those indictments and move the court to direct the jury to bring in a verdict in favor of the Thlinket Packing Company, or to dismiss the proceedings for want of evidence to establish each and all of the counts, or any of the counts, set out in the three indictments above mentioned, upon the following grounds and for the following reasons:
>
> "First, That each several indictment and every count thereof fails to charge that the defendant did unlawfully fish for, take, or kill salmon of any species.
>
> "Second, That there is no evidence to establish such fact in the case; that each and all of the several indictments, and each count thereof, do not allege that the defendant failed to close the gate, mouth, or

tunnel, or raise or lower the heart next to the pot in a trap that is designed and used by the defendant to fish for, take, or kill salmon of any species, and that there is no evidence in the case to establish such fact.

"Third, That each of the several indictments and every count therein does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge of which he is called upon to defend.

"Fourth, That each several indictment, and every count thereof, fails to allege that the said alleged fishing was done during the closed season.

"Fifth, That each several indictment and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels or facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to prevent the free passage of salmon in such a way as to embrace every element of the offense defined by the statute.

"Sixth, That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the district or place excepted from the statute; that is, it was not in Cook's Inlet, the Delta of the Copper River, Bering Sea,

or waters tributary thereto, or that it was not with one of the excepted forms of gear, viz: rod, spear or gaff, and that there is no evidence now before the jury to show as to whether or not, if any crime was committed, that it was committed within the prohibited districts of the waters of Alaska as defined by the section under which the indictments are made.

"Seventh, That each several indictment and every count thereof fails to charge the offense denounced by the statute in such a manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the court to pronounce judgment in case of conviction according to the right of the case.

"Eighth, That there is no evidence in the case on the part of the Government to disprove the fact or to show as to whether or not the way the respective traps were opened that there could or could not be a free passage of salmon and other fishes, counsel for the defendant company claiming that the reasonable construction of the statute is that if the trap was open in such a way so that it did not prevent the free passage of salmon and other fishes, then the spirit of the statute is complied with;

that the only thing the statute is intended to prohibit [permit] is the free running of salmon and other fishes, and that is an element which it is incumbent upon the Government to establish before it can establish any charge against the defendant company."

(P. R. 269-271.)

(5). In refusing to instruct the jury as requested by defendant in its request No. 1, which request was as follows:

"Gentlemen of the Jury, this is a criminal case consisting of three indictments against the defendant, and each indictment containing two or more counts or charges, each count or charge claiming on the specific date mentioned therein that the defendant violated the fishing laws of Alaska by reason of maintaining and operating certain fish traps and failing to, in some instances or some of the counts, to raise or lower the web of that part of the trap known as the heart, as required by law, and in other counts charging this last matter and also the failure to close what is known as the tunnel leading from the heart of the trap to the pot, as required by law. It is necessary for the Government to prove these facts last mentioned beyond a reasonable doubt before you would be justified in finding the defendant guilty of any one

or more of the counts contained in the three indictments referred to herein. And should the Government fail to prove to your mind beyond a reasonable doubt that the facts mentioned herein are true, then, it is your duty to acquit the defendant."

(6) In refusing to instruct the jury as requested by defendant in its request No. 2, which request was as follows:

"I also instruct you, Gentlemen of the Jury, that the purpose and spirit of the law is to protect salmon so that they may not be obstructed in their passage to their spawning ground during the weekly close season. Unless the Government in this case prove to your mind beyond a reasonable doubt that the web (279) of the heart of any trap described in any of these various indictments or various counts was not raised, opened or lowered in such a manner as to permit the free passage of salmon or other fishes to escape and go to their spawning ground, then, it is your duty to return a verdict of 'Not Guilty' herein."

(7). In refusing to instruct the jury as requested by defendant in its request No. 3, which request was as follows:

"The statute provides that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such a

manner as to permit the free passage of salmon or other fishes during the weekly close season. As a matter of fact if you find in any of the cases or charges against the defendant, that 25 feet of the webbing of the heart was so lifted or lowered to permit the free passage of salmon or other fishes, your verdict must be for the defendant, and, in this connection the statute does not mean that 25 feet of the heart of the trap must be raised or lowered vertically; if 25 feet of the webbing is lifted or lowered in a "V" shape but yet in such manner as to permit the free passage of salmon and other fishes such opening is a sufficient compliance with the statute and your verdict must be for the defendant."

(8). In refusing to instruct the jury as requested by defendant in its request No. 4, which request was as follows:

"The language of the statute is, that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes. That does not mean 25 feet square or that 25 feet must be torn out of the sides of the heart every weekly close season. Any manner of lowering or lifting 25 feet of the heart so as to permit the free passage of sal-

mon and other fishes so that they may go on through the trap to their spawning grounds is sufficient. And if you find as to any of the charges in these indictments that the heart of any (280) trap was so lifted or lowered or opened, your verdict must be for the defendant."

(9). In refusing to instruct the jury as requested by defendant in its request No. 5, which request was as follows:

"I instruct you that the right of fishing, or of fishery, as it is called, is common and free to every citizen. The Government has, however, the power to regulate and restrict it. This right to free fishing can only be limited or taken away just as far as any such regulations go; and, therefore, the regulations regarding salmon traps during the weekly close season, established by the Government, cannot be extended or expanded beyond their strict meaning. The statue says that:

'Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side of the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.'

"Unless the language of the statute itself provided that twenty-five feet of the heart on each side next to the pot should be lifted or lowered from the top to the bottom of the heart, it would be adding to the statute to say so.

"You must consider the law as it is. You must determine from the evidence whether 25 feet of the web of the heart on each side of the pot was lifted or lowered in such manner as to permit the free passage of salmon and other fishes. If you find that it was so lowered or lifted in any of the charges against this defendant alleged in the various indictments you must acquit the defendant as to such count."

(10). The court erred in instructing the jury as follows:

"It is not a matter of any importance in this case what a man by the name of Bower may have interpreted this law to be. It is not a matter of importance in this case, so far as my functions are concerned, how a man named Cobb may have interpreted this law. It is not a matter of importance how the Department itself may have interpreted this law. It is a question of what I think the language—what I think this law means, and whatever I think it means and what I tell you it means, you must accept as the law of the case.

"Now the indictment in this case is drawn under a certain section of the statute—I will read you that section:

" 'Throughout the weekly closed season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.'

"Now, I will tell you, gentlemen, what I think that section means, and first, I will say that I think it means just exactly what it says. I don't think there is a superfluous word in that section, nor a word that doesn't express its meaning. Now, let us see: 'Throughout the weekly closed season herein prescribed' —The statute has just prescribed that from six o'clock Saturday afternoon to six o'clock Monday morning is the weekly closed season. Now, it says: 'Throughout the weekly closed season herein prescribed — (that is the time now)—the gate, mouth or tunnel' — some people call it a gate, some call it a mouth, some call it a tunnel, so it says: ' The gate, mouth or tunnel of all stationary and floating traps '—some traps are stationary and some floating, evidently,

but the section takes them both in— 'of all stationary and floating traps shall be closed and—(it doesn't say or)—twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes.' Now, let us see—it wouldn't do to say that some of the net or webbing shall be lowered, unless the statute says how much shall be lowered, so the statute says twenty-five feet of the webbing or net shall be lowered or raised. If the statute stopped there, it would not be definite, because it wouldn't say what part of the webbing of the heart of the fish trap, so it is going to be definite about that, so it says: 'twenty-five feet of the webbing or net of the heart of such trap.' That wouldn't be definite if it stopped there, because the heart of a trap has two sides, so it says, in order to make that definite: 'Twenty-five feet of the webbing or net of the heart of the trap on each side' —each side means both sides, consequently— 'Twenty-five feet of the webbing or net of the heart on both sides' — that wouldn't be definite if it stopped there, because the heart extends over some little distance—what part of the heart? —Then it says: 'The heart next to the

pot.' What is to be done with it, this twenty-five feet of the webbing of the heart next to the pot on both sides of the heart—what is to be done with it? It shall be lifted or lowered. Now, there is the conjunction 'or' —either one, either lifted or lowered. Is that the end of the section? No. It not only says twenty-five feet of the webbing of the heart next to the pot on each side be lifted or lowered, but that twenty-five feet must be lifted or lowered in a certain way or to accomplish a certain end and so it says that it must be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

"Now, that is a positive command, gentlemen, that twenty-five feet of the net of the heart next to the pot shall be either lifted or lowered, twenty-five feet of it, and it is not only a command that twenty-five feet of it be lifted or lowered, but it is also a command that that twenty-five feet be lifted or lowered in a certain particular manner and to accomplish a certain particular end. Now, take that window-pane just over you — you see a string hanging down · that seems to divide that window-pane in two parts. Suppose that window-pane were actually

in two separate parts, so that each part could be lowered or raised and each part was twenty-five inches wide, and I asked you to please lower or raise twenty-five inches of that window next to this wall. (Indicating) I cannot see how it means anything but that I am asking you to either raise or lower that part of the window. I raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that way—I am asking you to raise or lower it. Now, twenty-five feet of the webbing of the heart next to the pot can be raised or lowered, but it need not be horizontal all the way from one end to the other, but there must be twenty-five feet of it in the clear, raised or lowered in such a way as to permit the free passage of fish—salmon and other fishes—for the whole distance of twenty-five feet." (P. R. 319-325).

(11). The court erred in receiving and filing over the objections of defendant the three verdicts of guilty rendered in causes Nos. 1034-B, 1035-B, and 1036-B, respectively, and erred in receiving and filing each and all of said verdicts.

(12). The court erred in overruling the following motion made by defendant:

MOTION

"Comes now the defendant in the above-entitled cause by its attorneys, M. G. Munly and Winn & Burton, and moves the court (58) that the verdict of the jury to the indictments in the above-entitled cause be set aside or considered and treated as a verdict of acquittal, and that the defendant be discharged upon the following grounds and for the following reasons, to-wit, viz.:

I.

"Because the true verdict of the jury, as expressed by the jurors through their foreman in open court at the close of the trial of the above-entitled cause and after they had retired to the jury-room and deliberated upon their verdict and at the time of bringing in their verdict into court, was to the effect that defendant had not violated the spirit of the law under which the aforesaid indictments were returned against the above-named defendant.

II.

"Because the verdict of the jury to the effect that the defendant had not violated the spirit of the law is the equivalent of a general verdict of 'not guilty.'

III.

"Because such a verdict does not affirmatively find the defendant guilty of all the elements of the crime charged in the indictments.

IV.

"Because sentence cannot be passed upon a defendant based upon a verdict other than that of guilty, and the true verdict of the jury in this case was to the effect that the defendant was not guilty of a violation of the spirit of the law.

V.

"Because any judgment which might be rendered in the above-entitled cause based upon a verdict of guilty would be founded upon a verdict which does not specifically find the defendant guilty of all the elements constituting the offense or offenses charged in the indictment and such judgment would be null and void.

VI.

"Because said verdict is not responsive to the issues."

"M. G. MUNLY,
WINN & BURTON,
Attorneys for Defendant."

(13). The court erred in overruling the motion for new trial herein, which is as follows:

MOTION FOR NEW TRIAL

"Comes now the above-named defendant, by its attorneys, M. G. Munly and Winn & Burton, in each of the above-entitled, numbered, causes consolidated, and feeling itself aggrieved herein, moves the court to set aside each and all of the verdicts rendered in said causes Nos. 1034-B, 1035-B, 1036-B, against the said defendant in each of said causes and filed in this court on the 30th day of October, A. D., 1914, for the following reasons and following causes materially affecting the substantial rights of said defendant.

"First. Irregularity in the proceedings of the court and jury and order and orders of the court made at the time and upon the reception of the verdict herein, and abuse of discretion of the court by said actions, rulings and orders of said Court by which the said defendant was prevented from having a fair trial herein; which said irregularities in the proceedings of the court and jury, and rulings and orders of the court so made, showing such abuse of discretion will more particularly appear by the affidavits of A. A. Gabbs, Z. M. Bradford, Joe Pippin, J. L. Gage, Charles H. Hall and Wallis George, jurors, hereto attached,

and the stenographic report of the rulings, orders and actions of the court at the time and upon receiving and filing the verdicts herein.

"Second. Insufficiency of the evidence to justify the aforesaid verdicts and each and all of them rendered in the above-entitled causes consolidated, and said verdicts and each and all of them are against law.

"Third. Error in law occurring at the trial and excepted to by the defendants.

"M. G. MUNLY,
WINN & BURTON,
Attorneys for Defendant."

(14). The court erred in signing and entering each and all of the judgments herein in cases Nos. 1034-B, 1035-B, and 1036-B respectively, and imposing a fine of One Hundred Dollars in each case upon the defendant.

ARGUMENT

In the consideration of the foregoing Specifications of Error and the presentation of this case to this Honorable Court, we may combine for argument the following, to-wit:

I.

(a). Specification of Error No. 1 claiming that the trial court erred in overruling both the general and special demurrers to the different indictments and each count contained therein.

(b). Specification of Error No. 2 being the objections made and filed, after the jury was empaneled and the first witness sworn, to the introduction of any testimony or evidence in the case.

(c). Specification of Error No. 4 being the error complained of in the trial court overruling and denying defendant's motion for a non-suit, or instructed verdict in the case.

Specifications Nos. 1 and 2 raise the question as to the sufficiency of the several indictments and each and every count therein contained. Specification No. 4 raises the same question and in addition thereto the question of the insufficiency of the evidence of plaintiff to support a verdict of guilty.

In order to understand and properly construe the

entire statute under which these several indictments were found, it is necessary to analyze its purpose as a whole. This statute was passed to Regulate Fishing in Alaska.

Referring to the Compiled Laws of the Territory of Alaska, the statute is at page 197.

Section 259, being the first section, provides for license tax upon canned and salt salmon;

Section 260 provides a system of rebates upon such taxes for maintenance of private hatcheries;

Section 261 declares dams, fish wheels and all kinds of obstructions to salmon in the streams to be unlawful;

Section 262 places restrictions on the operation of seines, traps, etc., as to distance, and other matters;

Section 263, under which these indictments were found, makes it unlawful to fish for, take or kill any salmon, of any species, at certain times in certain places and by certain gear;

Section 264 delegates power to the Secretary of Commerce and Labor to set aside streams for spawning grounds, and other powers;

Section 265 prohibits canning salmon forty-eight hours after catching and killing the same;

Section 266 prevents waste of fish;

Section 267 prevents false branding;

Section 268 provides for annual reports to be made by packers of salmon;

Section 269 places all kind of fishing under the control of the Secretary of Commerce and Labor;

Section 270 places the enforcement of the law in the hands of the Secretary of Commerce and Labor;

Section 271 provides punishment for its violation;

Section 272 authorizes prosecution in the coast states as well as in Alaska for violation of this act;

Section 273 repeals former acts in conflict;

Section 274 provides when the act shall become effective;

Section 263, under which the indictments were found, makes it *unlawful to fish for, take or kill any salmon of any species at certain times in certain places and by certain gear.* The evident purpose of this section is to denounce and *prohibit fishing for, taking or killing of salmon of any species,* (1) *during the weekly close season in all the waters of Alaska, except Cook's Inlet, the delta of Copper River, Bering Sea and the waters tributary thereto;* and (2) *prohibits such fishing during the daily close season prescribed for streams of less than* 100 *yards width.*

In this case we are concerned with the weekly close season only. The fishing for, taking or killing by rod, spear or gaff, of any salmon, is permissible. Fishing for, taking or killing salmon done by any other means during the weekly close season, is unlawful. The prohibition is not limited to traps alone. Fishing by gill net, or by any kind of seine, as well as by traps, is within the prohibition. In the case of traps, the law, as a matter of precaution, requires that traps shall be regulated in a certain manner,

that certain parts of the trap shall be open and certain parts of the trap shall be closed so as to more effectively prevent that kind of gear from *fishing for, taking or killing salmon.* In other words, *it requires that twenty-five feet of the webbing on each side of the heart, next to the pot, shall be lifted or lowered, so as to permit the free passage of salmon and other fishes, and it also requires that the gate, mouth or tunnel of all stationary or floating traps shall be closed during such close season.*

The section of the statute in question does not attempt to enlarge the offense defined in the first sentence of the section, that is,—"*It shall be unlawful to fish for, take or kill any salmon of any species* * * * *". Nor does it create another offense where there is a failure to lift or lower the webbing as required, or still another offense where the tunnel is not closed. If that were so there would be two different crimes created by the statute, for traps alone, Viz.: *fishing for, taking or killing salmon; and, the obstruction of salmon during the close season in question.*

Should the court hold *that a failure to have twenty-five feet of the webbing or net of the heart lifted or lowered in the manner prescribed by the statute, constitutes a crime, and also, a failure to have the tunnel of the trap closed constitutes a crime,* then the demurrer should have been sustained to counts 4, 5, and 6 of Indictment 1034-B, and all the counts from 1 to 7 in Indictment No. 1036-B, on the ground

and for the reason that each of said counts would charge two crimes, *that is, a failure to have the webbing or net lifted or lowered in the manner prescribed by the statute; and also a failure to have the tunnel closed.*

We contend that these additional clauses of the statute, and apparently upon which the indictments of this case are based, concern the regulation of traps during the close season and are merely directory and do not denounce as unlawful the failure to follow such terms. In other words, the crime consists of *the unlawful fishing for, taking or killing of any salmon by gill net, seine, or trap.* It was never intended that another and additional offense was created in the case of traps alone. The obstruction of salmon is denounced in Section 261 and 262.

The code of Alaska (Sec. 2158, Compiled Laws of Alaska 1913, page 51; 1 Fed. Statutes Ann., 341-348, Sect. 48) provides, among other things, that the indictment "*must be direct and certain* as regards (1) the party charged, (2) crime charged, and (3) the principal circumstances of the crime charged that are necessary to constitute a complete crime."

The indictments charge the defendant with "*maintaining and operating traps for fishing during the close season at certain points without having the tunnel of said trap closed and without having twenty-five feet of the webb or net of the heart of such trap on each side next to the pot thereof lifted or lowered, in such a manner as to permit the free passage of*

salmon and other fishes." The defendant in the caption of the several indictments is charged with "*unlawful fishing.*" Hence, the indictments are ambiguous and *not direct and certain* as required by the above statute.

Section 49 of the "Alaska Criminal Code (page 348, Fed. Stat. Ann., Subd. 4) prescribes "that the indictment is sufficient if it can be understood therefrom * * * (Subd. 6) that the act or omission charged as a crime is clearly and distinctly set forth in ordinary concise language, and without repetition, and in such manner as to enable a person of common understanding to know what is intended, and (subd. 7) that the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case."

Notwithstanding the foregoing statute the right of fishing, or fisheries, as it is called, under the common law was free to every citizen. However, the Government has the power to regulate and restrict it but statutes restricting such rights are in derogation of the common law and should be strictly construed.

> "In construing statutes in derogation of common right, the common law is presumed to be in force until it appears that it has been abrogated or modified by statute; therefore, except in jurisdictions where the rule has been abrogated by express amend-

ment, all statutes in derogation of the common law are to be strictly construed."

36 *CYC* 1179.

In order to enforce a penalty against a person it must be brought clearly within both the spirit and the letter of the statute.

Where the language of the Legislature is fairly susceptible of two different meanings, that one should be preferred which excludes and prevents conclusions that are mischievous and unjust.

State v. McGuire, 33 Pac. 666
State v. Fisher, 98 Pac. 713-4
Commonwealth v. Hall, 128 Mass. 410-
35 Am. Rep. 387.

It was doubtless the intention of Congress in the passage of the Act in question to provide a method of closing the traps and of adjusting the same so as to prevent illegal fishing. The failure to comply with this regulation alone does not constitute the crime denounced by the statute. The crime named *is the actual fishing for or catching of fish*, during the close season, and unless this is set out in the indictments by suitable averment, there is no proper allegation of the crime defined and denounced by the statute. Applying the above test, all of the indictments in the case at bar are fatally defective.

An indictment is fatally defective if an essential element of the crime intended to be charged is omitted and the sufficiency of the indictment is to be tested by ascertaining whether it contains every element

of such offense. All matters required by the act as pre-requisite to a criminal conviction must be set out in the indictment in order to make it sufficient, and as nothing in a criminal case can be charged by implication, intendment or recital, every fact necessary to be proven to constitute the crime must be directly and affirmatively alleged.

U. S. v. Hess, 124 U. S. 483.
U. S. v. El Paso N. E. R. Co. 178 Fed. 845
U. S. v. Carll, 105 U. S. 612.
U. S. v. Simmons, 96 U. S. 360.
Commonwealth v. Clifford, 8 Cush. (Mass.) 215;
Commonwealth v. Bean, 11 Cush. (Mass.) 414;
Commonwealth v. Bean, 14 Gray (Mass.) 52
Commonwealth v. Filburn, 119 Mass. 297.
U. S. v. Louisville & N. R. R. Co. 165 Fed. 936
U. S. v. Post, 113 Fed. 852.
U. S. v. Marx, 122 Fed. 964

. . In the above case of the United States vs. Simmons, the indictment charged that the defendant did knowingly and unlawfully cause and procure to be used as a still, boiler and other vessels for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, in a certain

building and on certain premises where vinegar was manufactured and produced against the peace and dignity of the United States, etc.

In order to constitute the offense under the statute, it was necessary that *vinegar was being manufactured on the premises at the time the still was used for distilling.* The matter came before the court and Mr. Justice Harlan held the indictment to be insufficient and said: "Nor does it sufficiently appear that vinegar was manufactured or produced *in the building and on the premises referred to at the time the still and other vessels were used for the purpose of distilling.* It is consistent with the averments that the vinegar had been manufactured or produced long prior to the date when the alleged distilling occurred. The two facts must co-exist, in order to constitute the offense described in the statute."

All of the above and foregoing citations are along the same line and uphold the same doctrine laid down in the Simmons case.

U. S. v. Marx, 122 Fed. 964. Indictment for conspiracy. The indictment alleged that defendants, residents of Eastern District of Virginia, did, at Washington in the District of Columbia, and at Norfolk, in the Eastern District of Virginia, within the jurisdiction of the court (Dist. Ct. E. Dist. of Va.), conspire etc. to defraud the United States. The court in sustaining the demurrer, said: "The case is now before the court on a demurrer to the in-

dictment, and without meaning to express any opinion as to the merits of the case, or whether the offense charged is itself an indictable one or not, the court is clearly of the opinion that the demurrer should clearly be sustained, as the indictment does not set forth the crime sought to be covered by it with that degree of particularity and accuracy required in the prosecution for conspiracy," Citing U. S. v. Hess, 124 U. S. 483.

Other strong cases on this point are:

Miller v. U. S. 133 Fed. 337.
Harper v. U. S. 170 Fed. 385.
Batchelor v. U. S. 150 U. S. 426
Ball v. U. S. 140 U. S. 135
U. S. v. Britton, 107 U. S. 655.
Morris v. U. S. 161 Fed 672.

In the case at bar the indictment does not directly charge that the Thlinket Company did *fish for, take or kill any salmon,* which is the gist of the offense denounced by the statute. Any averment to that effect in these indictments, is made purely by inference or implication, as it only charges that the traps were not regulated in such manner as to permit of the free passage of salmon and other fishes.

The implication of illegal fishing in this averment is so remote that it can hardly be considered that the government intended to charge that crime as defined by the statute. The only conclusion that can be drawn from the charge is that the Government relied upon the last paragraph of the statute, which

is only directory, as to the method of regulating traps during the close season, and does not define any crime or offense, or provide in any way that the failure to comply with its terms shall constitute the offense intended by the statute. "Obstructing the free passage of salmon" could not by any reasonable implication be construed as clearly charging the "*fishing for, taking or killing of any salmon.*"

No statute denounces the failure "*to permit of the free passage of salmon*" as a crime or states that it will be regarded as equivalent to the fishing for, taking or killing of salmon, and as the indictments merely charge failure to permit free passage of salmon, and do not charge the defendant with fishing for taking or killing salmon, it fails utterly to charge any crime, and therefore the demurrers to each and all of the indictments and each and every count therein contained should have been sustained.

The indictment must charge all the elements which constitute the crime so particularly as to enable the defendant to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense.

U. S. v. Hess, 124 U. S. 483.

U. S. v. Cruikshank, 92 U. S. 542.

U. S. v. Simmons, 96, U. S. 360.

In our judgment a conviction under this indictment would be no bar to another prosecution for the crime denounced by the section of the statute under consideration as the indictment charges only the

failure "*to permit the free passage of salmon and other fishes*, and this would certainly be no bar to a conviction for the "*fishing for, taking or killing of any salmon,*" etc. This is plainly contrary to the spirit of the criminal jurisprudence of the United States courts and in light of the decisions just cited is enough to render the indictments fatally insufficient on demurrer.

Section 263 being the section under which the indictments were found excepts certain waters from the force and effect of the statute, being the waters of Cook's Inlet, the Delta of Copper River, Bering Sea and the waters tributary thereto, and we believe that the indictment, in order to be sufficient, should have shown that the traps complained of were within prohibited waters.

See *State v. Turnbull*, 78 Me. 392; 6 Atl. 1.
U. S. v. Wood, 159 Fed. 187; 168 Fed. 438.
U. S. v. Britton, 107 U. S. p. 655.

So much for the demurrers and objections to the introduction of any evidence made at the time plaintiff opened its case.

MOTION FOR NON-SUIT OR INSTRUCTED VERDICT

(Assignment of Error No. 4.)

As stated heretofore the above mentioned motion which was made at the close of plaintiff's case in substance raises the same objections to the indictments as the demurers and, in addition thereto, the insufficiency of the evidence to sustain a verdict of guilty. Therefore, in consideration of this motion we will, in the first place, ask the court to apply the foregoing argument made in support of our demurers in support of this motion, and we will now proceed to present our reasons why we think that plaintiff's evidence will not support the verdicts of guilty.

The consolidated case was tried by plaintiff on the theory that it was only necessary for it to prove two things, or one of two things, in order to secure a conviction, that is:

> First, The failure of defendant during the weekly close season to have 25 feet of the webbing of the heart next to the pot lifted or lowered vertically in a rectangular shape; or
>
> Second, The failure of the defendant during the weekly close season to have the tunnel of said trap closed; or, the failure of the defendant to comply with both of the last mentioned conditions. (P. R. 165-169.)

This is the view that the trial court also took of the case as will conclusively appear from one or more of the instructions given to the jury by the court, which will hereafter be referred to. There was no evidence offered on any other phase of the case pertaining to the condition of the traps above mentioned except evidence to support the defendant's violation of one or both of the above named conditions.

While the fish warden Mr. Walker was upon the witness stand the District Attorney propounded the following question pertaining to one of the fish traps of the defendant:

> Q. Will you state whether or not you saw the trap fishing at that time?

An objection was interposed by counsel for the defendant to the question on the ground that there was no allegation in the indictments, or any of the counts thereof, that any of the traps were fishing at the time it is claimed the defendant violated the law, and this objection was by the court sustained. (P. R. 269-271.)

Should the court hold that these provisions of the statute are merely directory, then the motion for a directed verdict or non-suit should have been granted. On the other hand, should the court hold that these provisions of the statute are mandatory and the violation of either one or both charges a crime, still, at the time plaintiff rested its case, it was not shown that twenty-five feet of the webbing or net of the heart of any of the traps next to the pot were

not so lifted or lowered in such a manner as *to permit free passage of salmon and other fishes.* We contend under any circumstance it was incumbent upon the plaintiff to show that the way the traps in question were found at the time it is alleged that defendant violated the law were in such a condition to obstruct the free passage of salmon and other fishes. At the time the plaintiff rested its case there was not a word or syllable of proof of any kind that any of the traps complained of were ever found in a condition to prevent the free passage of salmon and other fishes. However, as contended in other parts of this brief, we think that the provisions of the statute under discussion are simply directory, but for argument's sake have assumed that the view that the trial court took of the law is correct, and then contend that the motion for non-suit should have been granted for the following reasons:

a. The entire absence of proof or any evidence to show that the traps complained of were in prohibited waters of Alaska.

b. That there was no evidence or proof to show that the defendant did fish for, take or kill any salmon of any species during the weekly close season prescribed by the statute.

c. Should the court consider the parts of the statute under consideration mandatory and not directory, then there was no evidence to show that the defendant had

not closed the mouth of the tunnel of the traps complained of, or had not lifted the webbing of the heart next to the pot in such a manner as to permit the free passage of salmon and other fishes.

d. There was no proof to show that any of the traps were fishing at the time of the alleged violation of the law.

Hence we claim that the trial court erred in not granting defendant's motion for non-suit or a directed verdict.

II.

ERROR IN THE COURT REFUSING TO GIVE TO THE JURY CERTAIN INSTRUCTIONS REQUESTED, AND IN GIVING TO THE JURY CERTAIN OTHER INSTRUCTIONS

(Assignment of Errors Nos. 5, 6, 7, 8, 9, and 10.)

In requesting the trial court to give certain instructions to the jury we followed out the court's interpretation and theory of the law concerning the raising or lowering of the webbing of the walls of the heart, and the closing of the tunnels of the traps referred to in the indictments. That is, we assumed that the defendant had to conform to these requirements of the law in such a manner as to permit the free passage of salmon and other fishes to their spawning grounds, and also further assumed that

a violation of these provisions of the statute to prevent this free passage of salmon and other fishes is a crime.

We submit to this Honorable Court, if the trial court's interpretation and theory of the law is correct, and we assumed that it was upon the tendering of certain instructions, then these tendered instructions should have been given, and it was error in the court to deny them.

We have set forth defendant's requested instructions in full in this brief, and need only to briefly refer to them in our argument.

We contend that requested Instructions Nos. I. and II. should have been given as they are a correct statement of the case and the law according to the court's interpretation of it. That is, that under such circumstances it is only necessary for the defendant to raise, open or lower the webbing of the walls of the heart and to close the tunnel in such a manner so as to permit the free passage of salmon and other fishes to their spawning ground.

Instructions Nos. III. and IV., tendered by the defendant, should have been given for the same reasons that Instructions I. and II. should have been given by the court, our contention being that the statute does not mean that twenty-five feet of each wall of the heart of the traps in question should be raised or lowered in any particular manner except in a way to permit the free passage of salmon and

other fishes so that they may go through the trap without materially being obstructed.

Requested Instruction No. V. refers to both the raising or lowering of the webbing of the heart of the traps and the closing of the tunnels during the weekly close season, and states that if this was done in such a manner as to permit the free passage of salmon and other fishes and not obstruct their run that then the requirements of the law were fulfilled.

Surely, if the defendant did not fish for, take or kill any salmon of any species and closed the gate, mouth or tunnel and lifted or lowered the webbing of the hearts of its traps in such a manner as to permit the free passage of salmon and other fishes, it committed no crime.

Outside of the court's instructions being extremely argumentative, we particularly objected and excepted to the instruction or instructions set forth in Specification of Error No. 10. The first part of the instruction is as follows:

> "It is not a matter of any importance in this case what a man by the name of Bower may have interpreted the law to be. It is not a matter of importance in this case, so far as my functions are concerned, how a man named Cobb may have interpreted this law. It is not a matter of importance how the Department itself may have interpreted this law. It is a question of what I think the language—what I think the law means,

> and whatever I think it means, and what I tell you it means, you must accept as the law of the case."

It appears from the evidence in the case, and we do not think that the plaintiff will deny it, that a man by the name of Bower and also that a man by the name of Cobb were predecessors in office of Mr. Walker, the latter being the fish warden at the time the acts complained of in the indictment took place, and it will further appear in evidence that both Bower and Cobb who were interested with the execution of the law permitted the defendant in this case prior to the year of 1914 to raise and lower the webbing of the walls of the heart and to close the tunnel in the same manner that the defendant was doing at the time of the acts complained of in the indictments. If the statute under which these indictments were found provides for the appointment of just such officers as Bower and Cobb, and if they were fish wardens to see that persons who were engaged in fishing in Alaskan waters should not violate the statute in question, and if the construction put upon the statute was tantamount to a departmental construction, the instruction of the court given is erroneous and prejudicial to the defendant.

It is stated in one of the early cases:

> "It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great

> weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

U. S. v. Johnson, 124 U. S. 236;

to the same effect are the cases of

U. S. v. Eaton, 169 U. S. 343;

U. S. v. Watton, 50 Fed. 694;

N. P. R. Co., v. U. S. 36 Fed. 285;

Johnson v. Morris, 72 Fed. 896.

Numerous other cases could be cited upholding the doctrine contended for. In one of the first cases on departmental construction Mr. Justice Trumbell said that in the consrtuction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

Edwards v. Dearby, 12th Wheat. (U. S. 210).

Judge Brewer tracing the growth of this principle of our law observed that:

> "From the time that Judge Trumbell announced it so cautiously in 1887 it has gained strength every time it was again considered by the court. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before."

In the case of *U. S. v. North Carolina State Bank*, 6 Pet. (U. S. 39) it is stated:

"Uniform interpretations by the executive department is entitled to very great respect."

Again in Peabody vs. Stark, 16 Wall. (U. S. 243).

"* * * * would of itself furnish strong grounds for a liberal construction."

In the case of the U. S. v. Moore, 95 U. S. 760, the court states:

"In the absence of a clearer conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we are inclined to adopt the uniform ruling of the office of the Internal Revenue Commissioner."

Again in U. S. v. Pugh, 99 U. S. 269, the court says:

"It ought not to be overruled without cogent reasons."

Again it is stated:

"In the highest degree persuasive if not absolutely controlling in its effect."

In Pennoyer v. McConnaughy, 140 U. S. 22, the court states:

"* * * * Should ordinarily control the construction of the statutes by the courts."

Again, under the Instructions or Instruction complained of in Assignment of Error No. 10, the Court told the jury, among other things, in referring to the webbing of the heart, and the manner in which it should be lifted or lowered:

> "Suppose that the window pane were actually in two separate parts so that each part could be lowered or raised and each part was twenty-five inches wide. I ask you to please lower or raise twenty-five inches of that window next to the wall. (Indicating). I cannot see how it means anything but I am asking you to raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that way. I am asking you to raise or lower it * * * * ." etc."

This instruction is ambiguous to say the least, and evidently conveys to the jury the impression that the webbing had to be lowered or raised a width of twenty-five feet vertically from the top to the bottom of the walls of the heart, whereas the instruction should have been in the language of the statute, "so raised or lowered as to permit the free passage of salmon and other fishes." Had this latter kind of instruction been given to the jury there could have been but one result, and that is, a verdict of not guilty because the uncontradicted evidence in the case shows that in all instances complained of the webbing of the heart was so raised or lowered so as to permit the free passage of salmon and other fishes.

See testimony of:

Forbes p. 280; *Keegan* p. 282-294.;
Nelson p. 299; *Davis*, p. 307.

III.

ERROR IN THE COURT RECEIVING AND FILING OVER OBJECTIONS OF DEFENDANT THE THREE VERDICTS HEREIN.

(Specification of Error XI.)

ERROR OF THE COURT IN OVER-RULING DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS RENDERED, OR TO CONSIDER AND TREAT THEM AS VERDICTS OF ACQUITTAL.

(Specification of Error XII.)

ERROR OF THE COURT IN OVER-RULING THE MOTION FOR NEW TRIAL.

(Specification of Error XIII.)

ERROR OF THE COURT IN RENDERING JUDGMENTS HEREIN AND IMPOSING FINES UPON THE DEFENDANT.

(Specification of Error XIV.)

The foregoing Specifications of Error may be combined for consideration.

After the jury had deliberated on this verdict, they came into Court. The question was asked by Judge Jennings "as to whether the jury had agreed on verdicts," and the Foreman, A. A. Gabbs, declared that we had, and asked Judge Jennings in open

Court as to whether it were possible for us to make any recommendations qualifying or amending the verdict. The Judge asked as to what recommendations or qualifications were wanted, and the Foreman thereupon made the statement that, "while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law." At that time, Judge Winn rose and asked for the Court Stenographer, as he wanted a record of the statement, and Judge Jennings refused to call the Stenographer, and said to Judge Winn substantially "I will not order the Court Stenographer to take such a statement," and then, speaking towards the jury, Judge Jennings said, "What you mean is a recommendation to the Court for mercy, and if so, you may write it in your verdict," or words to that effect. Thereupon, in open Court, the Foreman wrote in each verdict a recommendation for clemency of the Court, and handed the verdicts to the Clerk. Afterwards, Judge Winn rose, and opposed the receiving and filing of the verdicts, and asked to have the jury polled, and again called for the Court Stenographer. At that time the Court Stenographer appeared. After the jury was polled, Judge Jennings, turning to the said Foreman of the jury, said, "Now you may make the statement you did on bringing in your verdict," or words to that effect, and the Foreman repeated substantially his original statement to the Court.

Record 333-337.

It is of first importance to determine the nature and legal effect of this verdict. There was a finding of fact by the jury as follows:— "We think that, while the defendant has violated the letter of the law, it has not violated the spirit of the law."

Record p. 327.

(1) Was the finding of the jury a special verdict, and was it within the province of the jury to find such a special verdict?

(2) What was the force and effect of the special finding of fact of the jury upon the general verdict?

(3) What is the duty of the Court in the reception of the special verdict, coupled with the general verdict, and was there error shown in the remarks and instructions in regard to the special finding in question?

Chapter 16 of the Criminal Code of Alaska, commencing at page 731 of the "Compiled Laws of the Territory of Alaska" pertaining to verdicts, comprising Sections 2268 to 2272 inclusive, presents no special form of verdict. Section 2262 provides that "although the jury have the power to find a general verdict, which includes questions of law as well as fact, they are bound nevertheless to receive as law what is laid down as such by the Court; but all questions of fact, other than those mentioned in the last Section, must be decided by the jury, and all evidence thereon addressed to them."

Section 1038 of "Compiled Laws of the Territory of Alaska" and the Civil Code prescribe as follows:—

"When a special finding of fact shall be inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly." A special verdict need not be in any particular form.

12 Cyc 689

A verdict need not be in writing unless this is required by statute, and even when writing is ex- expressly required by statute, an oral verdict is not necessarily void.

12 Cyc 689

Ellis v. State, 18 Southwestern 139

Hart v. State, 19 Ohio 579.

A verdict need not be signed by the Foreman or by the Jurors.

12 Cyc 689

In (1,) no form of verdict having been prescribed by the Criminal Code of Alaska, and a statute not having prohibited the finding of special verdicts, it was lawful and proper for the jury, under common law practice, and rules of procedure, to make special findings and to bring in a special verdict; this principle is recognized by Section 1038 last above quoted.

We think the jury had authority to find a special verdict, and that the finding made by the jury that, while the defendant "*had violated the letter of the law, it had not violated the spirit of the law,*" was tantamount to a special verdict and special finding of the jury, and that it is the duty of the Judge, where the verdict is special, to declare the law and instruct

the jury touching the form of their verdict under such finding. If guilty, that should be the form of the verdict; if not guilty, the finding in itself stands as an acquittal. If the findings are defective, the jury should be so instructed, and they should be requested to retire for further deliberation; or if the jury has been discharged, to award a new trial.

At comomn law, the jury may give a special verdict in all felonies. By this verdict, the facts are found by the jury and become a part of the record, and questions of law are submitted to the Court to be decided.

12 Cyc 690

Underwood v. People, 32 Mich. 1
20 Am. Rep., 633;

Commonwealth v. Eichelberger, 119
Pa. State 254, 4 Am., St. Rep. 642;
13 Atl. 422;

Commonwealth v. Chathams, 50 Pa.
State 181

McGuffie v. State 17th Ga. 497.

State v. Savage, 36 Ore. 191.
60 Pac. 610;
61 Pac. 1128;

State v. Moore, 29 N. C., 228

It is held in the Underwood case supra that a special verdict was not unauthorized at common law Commonwealth v. Chatham supra, the Court said:— "The jury have a right in all cases whatsoever,

whether capital of otherwise, to find a special verdict, by which the facts of the case are put on record and the law submitted to the judges."

In State vs. Morris supra, the Court says:—"The court must say upon the facts found (in a special verdict) that in law they constitute or do not constitute the offense charged, and thereupon the verdict of the jury is entered in accordance with opinion of the Court."

State v. Bray, 89 N. C. 480

"The court can add nothing to this finding. They can draw only the legal conclusions from the facts found. No facts can be inferred by the court which the jury have not inferred and set forth, especially against the defendant in a criminal case."

People v. Wells, 8 Mich., 103

In the case of People v. Piper, 50 Mich., 390, there was rendered a general verdict of Guilty, and attached to it was a special verdict. The Court held that under the special finding, notwithstanding the verdict of Guilty, there should be no judgment entered upon the general verdict, and the proceedings were set aside and the defendant discharged. Where a special verdict in a criminal case finds that the de-

12 Cyc 689.

fendant had committed only part of the acts essential to the proof of the commission of crime, and that the principle element thereof was wanting, such verdict was equivalent to an acquittal.

State v. Stephanus 53 Ore. 135;
99 Pacific 429

This is a late case and worthy of consideration and weight, as we have not been able to find any difference in the Statutes of Oregon and those of Alaska pertaining to criminal procedure and verdicts. It is further held that in the Stephanus case, where special facts found are true, there must be sufficient to establish the guilt of the accused of the crime charged, in the absence of which, the same result must follow as in a failure to find a defendant guilty under general verdict. In this case there was a general verdict of guilty attached to the special verdict, and the Supreme Court set aside the judgment of conviction, and ordered the Court below to discharge the defendant, holding, further, that nothing can be added to a special verdict by inference, and when it omits to set forth any facts essential to constitute the crime charged, it amounts to an acquittal.

If the case be taken out of the Statute by a finding of fact in a special verdict, it is an error to instruct on the law and direct the jury to reconsider their verdict.

Duncan v. State, 49 Miss. 331

A special verdict professes to find all the material facts which have been proved to the satisfaction of the jury, and concludes that, if upon the facts so found, the Court should be of the opinion the defendant is in law guilty, then the jury find him Guilty; but if upon the facts thus found, the Court should be of the opinion that defendant is not in law guilty, then they find him Not Guilty.

28 Fed. Cas. No. 16649, p. 480, Ist Col.

We think that the foregoing authorities have established without any question *that the finding of the jury was a special verdict*, and it was within the province of the jury to find such special verdict, and, furthermore, that the special finding of the jury should control the general verdict. What, then, was the duty of the Court in the reception of a special verdict of the kind in question, coupled with the general verdict, and was it not error in the Court requesting the jury to modify its verdicts in the manner in which he did?

The special fining of the jury is "We think that, while the defendant has violated the letter of the law, it has not violated the spirit of the law." What is meant by the "spirit of the law?"

"The principle of life and vital energy."

The new Standard Dictionary of English Language.

"The breath of life, life or life principle."

Webster's New International Dictionary.

In Holy Trinity Church v. U. S. 143 U. S. 459, Mr. Justice Brewer said, "It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit." In this case, the Court held that, although the Act of Congress expressly forbade the importation of any alien, under any contract of agreement, to perform labor, or services *of any kind*, in the United States, its territories or districts, that this

prohibition did not apply to the importation by an American church of a foreign clergyman under a contract to enter its services as rector or pastor, as such importation on a contract, while indeed a violation of the *letter of the law, did not constitute a violation of the spirit of the law, and therefore was not within the statute.*

U. S. v. Buchanan, 9 Fed. 690.

The Court stated, among other things. "We must consider the object and spirit of the statute, and try to ascertain from the language of the whole, and every part of the statute, what was the intent and purpose of the Legislature in making the statute. * * * * When ascertained, the intent, should be followed with reason and discretion though such construction *may seem contrary to the letter of the statute.*" See also to the same effect, Murray v. New York Central R. R. Co., 3 N. Y. Reports 341.

In Treat v. White, 181 U. S. 267, Mr. Justice Brewer said: "We do not question the fact that there are times when the mere letter of the statute does not control, and that a fair consideration of the surroundings may indicate that which is within the letter is not within the spirit, therefore must be excluded from its scope."

See also Heydenfelt v. Denny, 93 U. S. 634, National Waterworks Co. v. Kansas City 65 Fed. 697.

We could cite numerous other cases following the general rule laid down by the cases just quoted, but

do not think it is necessary, as we do not believe that the doctrine which we contend for, and which is established by the foregoing authorities, can be successfully contradicted or denied.

It will now be in order to consider the force and effect of the special finding and the duty of the court in this connection.

At a particular stage of the trial, before the verdict was handed in, the court interfered. It

(1) refused to enter the verdict of the jury as announced;

(2) It gave an erroneous instruction to the jury, viz.: it instructed the jury that its finding was in reality the equivalent of a recommendation for mercy or clemency, instead of its real meaning;

(3) It further instructed the jury to enter a verdict of guilty, with recommendation to the court for mercy or clemency;

(4) It refused to instruct the jury that the real meaning and significance of their finding was the equivalent to a verdict of Not Guilty;

(5) The trial court usurped the function of the jury from the moment the jury entered the court room, and dictated their verdict, and refused to enter their real verdict.

The function of the court is simply to instruct the jury and to conduct the trial in an orderly manner. The functions of the jury are to try the case upon the evidence and the law, as given by the court, but if the instructions or directions of the court are

erroneous, there is no trial. If the court steps in and dictates a verdict which is not the true verdict of the jury, but to the contrary, it is more than a mistake.

The jury in this case had concluded their deliberations, and had virtually found the defendant Not Guilty; but laboring doubtless under a mistake, they had written a verdict absolutely the opposite of their true finding. Before that verdict was presented, the jury informed the Court of their real finding. They asked the court if they could modify their verdict as written. This was done before the verdict was handed in, and then and there we claim that the court stepped in and modified the verdict against the finding of the jury, and did this in open court, without having the jury retire for further consideration of the case. This, we claim, was a usurpation of the rights of the jury, and rendered the proceedings a nullity. The course of procedure in this case was the same as if the verdicts of the jury were merely advisory, and not binding upon the court, and the court should have treated them as advisory and set the verdicts of "Guilty" aside. The jury are the sole judges of the facts, and they alone may write their verdict and deliver it to the court. In the case at bar, they neither wrote the verdict entered, nor delivered it. The court exercised this function, and we contend the jury had found a different verdict, but this the court refused to hear. The jury had found that defendant *had not violated the spirit of the law*, and hence we contend under authorities there could be no conviction.

The trial by a jury in the exercise of its duty and functions in any case continues up till the time its verdict is entered and the jury discharged. See Sections 1025-1034 of "Compiled Laws of the Territory of Alaska." Hence, interference by the Court with the jury, or directing the jury what it should do or should not do, before the verdict was received, filed and entered, was error. "A verdict of acquittal cannot be set aside, and therefore if the court can direct a verdict of Guilty, it can do indirectly that which it has no power to do directly."

U. S. v. Taylor, 11 Fed. 471.

Jury should not be coerced to agree upon a particular verdict or any verdict.

People v. Faber, 199 N. Y. 256,
92 N. E. 674.

Here in the case at bar, the trial judge should have instructed the jury that the special verdict was the equivalent of acquittal. The defendant should have been discharged on the court's own motion and defendant's motion not to enter the general verdict of Guilty, and its subsequent motion to discharge defendant, should have been allowed.

Independent of the question as to whether or not the jury returned a special verdict specifically acquitting the defendant for the crime charged in the indictment, the record in this case presents another question for the consideration of this court, which, although essentially fundamental in its nature, does not seem to have ever been raised upon a similar

state of facts or under circumstances identical with those under which it comes before the court at the present time, as the record in the case at bar shows that in this case, in our judgment, the trial court absolutely directed the jury to find the defendant Guilty.

In most of the cases in which this question has been directly adjudicated by the courts of the United States, it has arisen where the appellate courts have been called upon to decide whether or not certain language used by the trial courts in instructing the jury did not amount to an instruction to find defendant guilty, or whether or not, under circumstances surrounding a given case, the jury might not be impelled to interpret such instruction as a direction to them to find the defendant guilty. In these cases, whenever the appellate courts have decided that the language used by the trial court amounted to the direction of a verdict of Guilty, or might, under the circumstances, have been reasonably considered as such a direction to the jury, they have invariably set the verdicts aside, and awarded new trials, upon the ground that the defendant's constitutional rights had been impaired. In the case at bar, the question has not been raised under circumstances corresponding to those in any of the above enumerated cases.

The circumstances under which this defendant contends that it was deprived of its constitutional right of trial by jury, are fully shown by the uncon-

troverted affidavits of the jurors set out in the record in support of the Motion for New Trial.

Record p. 333-337.

The court, instead of informing the jury that if this was their finding it was their duty to sign the verdict acquitting the defendant, or having a verdict entered corresponding to the finding of the jury, refused to allow the statement to be recorded at that time by Court Stenographer, and then told the jury in substance that what they meant was a recommendation for leniency and directed them to write such recommendation into the blank verdict of Guilty, prepared by the District Attorney.

In conclusion, we contend that the jury, by its finding that the defendant had *complied with the spirit of the law*, and was therefore not guilty of the violation of the spirit of the law, did not find the defendant guilty of one of the most essential elements of the crime charged, and its finding that the spirit of the law had not been violated was essentially a finding of Not Guilty, as it served to absolutely negative the effect of the existence of this most essential requisite of the offense charged, and comes directly within the doctrine of the cases cited in this Brief. When the jury reported this finding in open court, we contend it became the duty of the presiding judge, either upon the motion of Counsel, or independent of motion of Counsel, to instruct the jury that, if they believed that the defendant had not been guilty of a violation of the spirit of the law, it was

their duty to return a verdict of Not Guilty in each case.

The court had no power to peremptorily instruct the jury the kind of verdict it should find for, we believe that his actions in the premises were equivalent to a direct instruction to the jury to find the defendant guilty when it was shown by the actions of the jury and the special finding made that the defendant was not guilty. See case of

U. S. v. Taylor, 11 Fed. 470;
Atchison T. & S. F. Ry. Co., v. U. S.
172 Fed. 195.

In the latter case, among other things, the court states:

> "For if it be a criminal offense, plaintiff in error was entitled to the verdict of the jury respecting its guilt or innocence—not a verdict in form only but a verdict expressing the real verdict of the jury; for such is the guarantee of the Sixth Amendment to the Constitution of the United States.
> (Citing *U. S. v. Taylor*, 11 Fed. 470;
> *Star v. U. S.* 153 U. S. 625;
> 38 L. Ed. 841.)

The learned judge, after first determining that this was a criminal prosecution, as distinguished from a civil suit, to recover a penalty set the verdict aside on the ground that the trial court had infringed upon the constitutional right to a trial by jury.

In the case of Dolan vs. U. S. 123 Fed. 52 which came before this Honorable Court upon a rehearing of an appeal from Alaska, Judge Hawley, in discussing the right of the judge to invade the province of the jury by its instructions, says:

> "We are of the opinion that the court invaded the province of the jury in the giving of this instruction, in this: that it assumed as an established fact that Misener made the statement testified to by Palmer instead of leaving this question of fact to be decided by the jury, contrary to the well settled principle of the law and in direct opposition to the provisions of Section 157 of the Penal Code of Alaska," (being Sec. 2266 of the Compiled Laws of the Territory of Alaska.)

See also *State v. Hatcher*, 44 Pac. 584.

In Star vs. U. S., 153 U. S. 614, Chief Justice Fuller said, among other things, in discussing the respective duties of the court and the jury (page 626):

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight and that his slightest word or intimation is received with deference and may prove controlling, etc. * * * * ."

> "The court could not, consistently with the constitutional right of trial by jury sub-

mit part of the facts to the jury and itself determine the remainder. * * * * *."

Thomas v. American, etc. Land Co.
47 Fed. 550.

On this point see also

Breese v. U. S., 108 Fed. 804;
Georgia v. Braisford, 3 U. S. 4;
Stimus v. U. S., 24 Fed. Cas. No. 13387;
Thomson v. Utah, 110 U. S. 574.

By reason of the errors complained of and set forth, committed by the trial court, and from the authorities cited in support of our contention herein, we therefore respectfully submit that the three judgments of the court entered in this consolidated case should be set aside, and an order made directing the trial court to enter the verdicts of the jury as verdicts of acquittal, or that the motion for new trial herein should be granted.

Respectfully submitted,

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